

**JAGINDAR SINGH & ANOR. v.
TARA RAJARATNAM**

[O.C.J. (Yusoff Mohamed J.) November 20, 1986]

[Johore Bahru — Civil Suit No. 23-12-1986]

Civil Procedure — Privy Council decision — Action to re-open on ground of discovery of new evidence — Fraud and undue influence — Concurrent findings of fact by Federal Court and High Court against plaintiffs — Matter laid to rest by Privy Council — Plaintiffs now allege fraud against defendant who won appeal in Privy Council — Stay of Privy Council's judgment — Principles — Defendant applying to strike out writ and application for stay — Whether granted.

In this unprecedented action filed on January 4, 1986, the plaintiffs sought to set aside or vary the judgment in Civil Suit No. 284/79 dated December 16, 1985, as affirmed by the Privy Council (see [1986] 1 M.L.J. 105), on the ground of discovery of new evidence. The plaintiffs also applied by summons-in-chambers for a stay of execution and further proceedings in the judgment pending hearing of this action. The defendant promptly applied to strike out the writ and summons of the plaintiffs.

In the said Civil Suit 284/79, the present defendant (plaintiff there) based her action on grounds of fraud and undue influence on the part of the present plaintiffs. Both the Federal Court (see [1983] 2 M.L.J. 196) and the Privy Council affirmed the findings of the High Court that the transaction of March 30, 1974 between the present plaintiffs and the defendant had been fraudulent in that the plaintiffs falsely represented to the defendant that the transaction was of the nature of a security when in fact the plaintiffs had no intention of allowing the defendant to redeem the property (see [1983] 2 M.L.J. 127; [1984] 1 M.L.J. 175).

The plaintiffs now allege that the defendant had fraudulently, and with intent to deceive, concealed and suppressed the fact from the court that during the transaction, the defendant and her husband had left the plaintiffs and consulted one V.A. Nair on whose advice the defendant had asked the second plaintiff for an option to repurchase the property. It is also alleged that her concealment and suppression of material evidence led the learned judge to come to a finding of facts detrimental to the plaintiffs, which he otherwise would not have made. The plaintiffs therefore contended that the defendant had obtained the judgment by fraud. They filed an affidavit dated April 28 1986 from V.A. Nair in support of their application. The new evidence disclosed in the affidavit came to light after the judgment of the Federal Court but before the appeal to the Privy Council was heard.

Held: (1) the present writ amounts to seeking to re-open, by way of introducing fresh evidence, the issues of a matter which has been laid to rest by the Privy Council. The principle to be applied is the same as that in *Lau Foo San v. Government of Malaysia*⁽¹⁾ in which Suffian F. J. (as he then was) laid down three conditions which must be fulfilled in order to justify the reception of the new evidence;

A (2) the fresh evidence of V.A. Nair is incredible and does not satisfy the third condition of the established principle. There is no ground in the allegation that the judgment of the court had been obtained by fraud;

(3) proper litigation and integrity of the parties would have deemed that this discovery of new evidence be disclosed to the Privy Council then hearing the appeal;

B (4) it is an abuse of the process of the court to grant the plaintiffs' wish to have a second bite at the proverbial apple;

(5) the plaintiffs writ is struck out with costs. Their application for stay of the Privy Council's judgment is refused.

C [Editorial Note: The plaintiffs appealed against the decision of Yusoff Mohamed J. to the Supreme Court *vide* Supreme Court Civil Appeal No. 384 of 1986. The Supreme Court (Salleh Abas L.P., Lee Hun Hoe C.J. (Borneo) and Abdoocader S.C.J.) unanimously upheld the decision of the learned judge and dismissed the appeal with costs on February 24, 1987. Mr. Gan Eng Chee appeared for the plaintiffs in the appeal while Mr. Subra Naicker appeared for the defendant. For earlier proceedings, see also [1979] 2 M.L.J. 172; [1981] 1 M.L.J. 97 & 232, F.C.; [1983] 1 M.L.J. 71 F.C.]

Cases referred to:

E (1) *Lau Foo San v. Government of Malaysia* [1970] 2 M.L.J. 70, 71.
(2) *Ladd v. Marshall* [1954] 3 All E. R. 745.

APPLICATION.

Sagadeva s/o Sivapragasam for the first plaintiff.

Second plaintiff in person.

F *Subra Naicker* for the defendant.

Cur. Adv. Vult.

Yusoff Mohamed J.: This is an unprecedented action in this court, designed to re-open the case after it was finally decided by the Privy Council on appeal on the ground of discovery of new evidence.

By a writ filed on January 4, 1986, the plaintiffs' claim was to set aside or vary the judgment in Civil Suit No. 284 of 1979 dated December 16, 1985 as affirmed by the Privy Council on appeal in Privy Council Appeal No. 39 of 1983 [see [1986] 1 M.L.J. 105]. On January 9, 1986, the plaintiffs also filed a summons applying for stay of execution and further proceedings in the judgment pending hearing of this action at enclosure (6).
H On the same day the defendant filed a cross-summons to strike out both the writ and the plaintiffs' summons-in-chambers as at enclosure (8).
I

In Civil Suit No. 284 of 1979, the defendant (the plaintiff there) based her action on grounds of

fraud and undue influence by the plaintiffs here. Both the Federal Court and the Privy Council at appellate stage affirmed the findings of the High Court judge that the transaction of March 30, 1974 between the plaintiffs and the defendant had been fraudulent in that the plaintiffs falsely represented to the defendant that the transaction was of the nature of a security when in fact the plaintiffs had no intention of allowing the defendant to redeem the property — see p. 9, paragraph 2 of the Privy Council's judgment [see [1986] 1 M.L.J. 105 at 109F].

The Privy Council also held that the misrepresentation by the plaintiffs were findings of fact by the learned judge and as such the Board "refrains from disturbing concurrent findings of fact in the two courts below" — see p. 15 paragraph 2 of the judgment [see [1986] 1 M.L.J. 105 at 112D].

It is now alleged by the plaintiffs that the defendant had fraudulently, and with intent to deceive, concealed and suppressed the fact from the court that during the transaction the defendant and her husband had left the plaintiffs and consulted one V.A. Nair on whose advice the defendant had asked the second plaintiff for an option to repurchase the property.

It is also alleged that this concealment and suppression of material evidence led the learned judge to come to a finding of facts detrimental to the plaintiffs which finding he would otherwise not have made.

Based on this allegation, the plaintiffs contended that the defendant had obtained the judgment complained of by fraud.

In supporting the plaintiffs' application, V.A. Nair filed an affidavit dated April 28, 1986 confirming that he was present at the defendant's house at No. 681 Kulai Besar, Johor on the relevant date and time but that he was in a different room. He also affirmed that the defendant and her husband had consulted him relating to the transfer of the property to the plaintiffs when he advised them to take an option to repurchase the land from them.

The present writ, in my view, amounts to seeking by the plaintiffs to re-open the issues of a matter which has been laid to rest by the Privy Council by way of introducing fresh evidence. Both these applications, by the defendant to strike

A out the writ and the plaintiffs' application for stay of judgment, have been extensively argued by the respective counsel. However, the principle to be applied here is the same as in *Lau Foo San v. Government of Malaysia*⁽¹⁾ on an application to adduce further evidence on appeal.

B In referring to that principle as enumerated by Denning L.J. in *Ladd v. Marshall*,⁽²⁾ Suffian F.J. (as he then was) laid down three conditions which must be fulfilled in order to justify the reception of this new evidence:

C "First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.

Second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive.

D Third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently creditable, although it need not be incontrovertible."

E Now, this fresh evidence of V.A. Nair, if it is presumably to be believed, is in my view, incredible. This litigation had been going on since 1976 and the High Court trial held in 1981, which lasted for about 30 days, was not without reasonable publicity. It is incontrovertible that V.A. Nair would not have had knowledge of the trial.

F His only reason for not appearing as a witness at the trial as appears in his affidavit of April 28, 1986 is that he was afraid that his statement might be misconstrued. It is not explained who might have misconstrued his evidence if he had come forth as a witness as he is prepared to do now. Certainly not the court or the judge who had conducted the trial.

G In this view, the new evidence does not satisfy the third condition of the established principle.

H On the other hand, it is not shown the defendant had fraudulently concealed or coerced the witness into not appearing at the trial and there is therefore no ground in the allegation that the judgment of the court had been obtained by fraud.

I As borne out by V.A. Nair's letter dated November 19, 1984 — exhibit VAN.1 to his affidavit — this new evidence came to light after the judgment of the Federal Court but before the appeal to the Privy Council was heard (see also plaintiffs' affidavits of January 19, 1986 and April 22, 1986).

Proper litigation and integrity of the parties would have deemed that this discovery of new evidence be disclosed to the Privy Council then hearing the appeal. Failing which, the party concerned should not be heard to complain that he has lost the appeals.

In my opinion, it is an abuse of the process of the court to grant the plaintiffs' wish to have a second bite at the proverbial apple. On these grounds, the plaintiffs' writ is struck out with costs to the defendant. The plaintiffs' application for stay of the Privy Council's judgment is refused.

Application dismissed.

Solicitors: *Moses & Saga; P. Suppiah & Co.; Subra Naicker & Co.*

ROHANA BTE ARIFFIN v. UNIVERSITI SAINS MALAYSIA

HASHIM HUSSIN YAACOB v. UNIVERSITI SAINS MALAYSIA

[O.C.J. (Edgar Joseph Jr. J.) November 13 & 24, 1986]

[Penang – Originating Motions 32-17-86 and 32-19-86]

Administrative Law – Certiorari – Order for – Preliminary objection – Whether affidavit of service can be filed before motion is entered for hearing – Impossibility – When should affidavit be filed.

Civil Procedure – Certiorari – Order for – Affidavit of service – When should affidavit be filed – R.H.C. 1980, O. 53 r. 2(4).

In the two cases, the applicants, both lecturers in the respondent university, obtained leave to apply for an order of certiorari. Their applications were heard together by the present court. Both the applicants were found guilty of certain offences by the disciplinary authority of the respondent. The council of the respondent dismissed their appeals. Therefore they sought the order of certiorari to quash the decisions of the council of the respondent.

Before the substantive applications were heard, a preliminary objection, *inter alia*, was raised by the respondent. It was contended that under Order 53 rule 2(4) of the Rules of the High Court 1980, an affidavit of service is to be filed before the motion or summons is entered for hearing. Service must, in practice, be effected within 14 days after the grant of leave. It was contended that this procedure was not followed in the present case and therefore the applications were incompetent and should therefore be dismissed *in limine*.

A *Held, inter alia:* (1) on the construction of the Rules, it is impossible to file an affidavit of service before the motion is entered for hearing;

(2) since the affidavit of service is only required when the substantive applications are heard, it is sufficient compliance with the Rules if the affidavit is filed before such date;

B (3) on the facts of the present case, the respondent had ample notice even before leave was granted that the applicants intended to apply for orders of certiorari and no question of prejudice could arise nor for that matter could any have been alleged having regard to the circumstances;

C (4) alternatively, even if there has been a breach of Order 53 rule 2(4), the court should condone the breach since the respondent suffered no prejudice;

(5) the preliminary objection should be dismissed.

Cases referred to:

- (1) *Jasabena Sdn. Bhd. v. Beh Heng Poo* [1985] 1 M.L.J. 394.
- D** (2) *Rex v. Leicestershire Justice* [1850] 15 Q.B. 88; 117 E.R. 391.
- (3) *Mayer v. Harding* [1867] L.R. 2 Q.B. 410.
- (4) *Harding v. Price* [1948] 1 K.B. 695.
- (5) *Metroinvest Ansalt v. Commercial Union* [1985] 1 W.L.R. 513, 521.
- (6) *Gan Hay Chang v. Sow Kian Yuh* [1975] 2 M.L.J. 129, 131.
- E** (7) *Secretary of State for Defence v. Warn* [1970] A.C. 394, 402.
- (8) *Mersing Omnibus v. Minister of Labour* [1983] 2 M.L.J. 54.
- (9) *Soho Square Syndicate Ltd. v. E. Pollard & Co. Ltd.* [1940] Ch. 638.
- F** (10) *Bowmaker Ltd. v. Tabor* [1941] 2 K.B. 1.

ORIGINATING MOTION.

Haji Sulaiman bin Abdullah for the applicants.

N.G. Sivanander for the respondent.

Cur. Adv. Vult.

G **Edgar Joseph Jr. J.:** In these two consolidated applications by Rohana bte Ariffin and Hashim Hussin Yaacob, both lecturers in Sociology and Development Studies at the Universiti Sains, Malaysia, the respondent herein, made pursuant to leave granted by Harun J. on May 21, 1986 for orders of certiorari to remove into this court, for the purpose of they being quashed, two separate decisions dated March 10, 1986 of the council of the respondent University dismissing their appeals from decisions of the disciplinary authority of the respondent University whereby, in the case of Rohana, she was found guilty of a single count and, in the case of Hashim, he was found guilty of four out of six counts, in contravention of certain rules of the Universiti Sains (Discipline of Staff) Rules 1979, on grounds of bias, denial of natural justice and